Supreme Court, U.S.
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No. 02-306

IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK and
BENEFICIAL TAX MASTERS, INC.,

Petitioners,

v.

MARIE ANDERSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Statutory Provisions Involved	1
Statement of the Case	1
Summary of Argument	3
Argument	5
A. The Burden Is On Defendants To Show That State Law Causes Of Action Are Removable.	5
1. The Jurisdictional Question Must Be Analyzed Pursuant To The Well-Pleaded Complaint Rule.	6
2. No Federal Cause Of Action Appears On The Face Of Plaintiffs' Complaint.	7
B. A Defense To A State-Law Claim Cannot Provide A Basis For Federal Jurisdiction.	9
1. Difference Between Ordinary And Complete Preemption.	10
2. The National Bank Act Does Not Meet The Test For "Field", "Complete" Or "Super" Preemption".	12

Contents

	Page
D. The Effect Of ERISA And The LMRA Highlight The Lack Of Complete Preemptive Power In The National Bank Act.	27
E. Defendant's Position Would Create An Entirely New Type Of Federal Jurisdiction – "Claim Removal".	32
Conclusion	37

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985)	35
Anderson v. H & R Block, Inc., et al., 287 F.3d 1038 (11th Cir. 2002)	2
Avco v. Aero Lodge No. 735, 88 S. Ct. 1235 (1968)	14, 29, 30, 31
Barnett Bank v. Nelson, 116 S. Ct. 1103 (1996) ...	33-34
BLAB TV of Mobile, Inc. v. Comcast Cable Comm., Inc., 182 F.3d 851 (11th Cir. 1999)	10, 27
Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207 (11th Cir. 1999)	17-18
Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988)	28
Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987)	*passim*
Electrical Workers v. Hechler, 107 S. Ct. 2161 (1987)	11
Farmers & Mechanics' National Bank v. Dearing, 91 U.S. (1 Otto) 29 (1875)	10

Cited Authorities

	Page
First National Bank of Aberdeen v. Aberdeen Nat'l Bank, 627 F.2d 843 (1980)	14
Florence R.R. & Improvement Co. v. Chase National Bank, 17 So. 720 (Ala. 1895)	12
Franchise Tax Board of the State of California Laborers Vacation Trust, 103 S. Ct. 2841 (1983)	*passim*
Great Northern & Co., v. Alexander, 38 S. Ct. 237 (1918)	5
Griffin v. Breckenridge, 91 S. Ct. 1790 (1971)	35
Gully v. First National Bank of Meridian, 57 S. Ct. 96 (1936)	*passim*
Hare, et al. v. H & R. Block and Beneficial, Case No. CV-02-C-C-1848-W	33
Healy v. Ratta, 54 S. Ct. 700 (1934)	6
Helms v. First Alabama Bank, N.A., 386 So. 2d 450 (Ala. 1980)	12
Hunter v. Beneficial National Bank USA, 947 F. Supp. 446 (M.D. Ala. 1996)	33-34
Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1970)	35

Cited Authorities

	Page
Jones v. BankBoston, N.A., 115 F. Supp. 2d 1350 (S.D. Ala. 2000)	21, 22
Lowery v. First National Bank of Oneonta, 196 So. 891 (Ala. 1940)	13
Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085 (1985)	18
M. Nahas & Co., Inc., 930 F.2d 608 (8th Cir. 1991)	12, 15, 22
Mayor & Alderman of City of Nashville v. Cooper, 73 U.S. 247 (1867)	26
Mercantile Nat'l Bank at Dallas v. Longdeau, 371 U.S. 555 (1963)	15
Merrell Dow Pharmaceuticals, Inc. v. Thompson, 106 S. Ct. 3229 (1986)	9
Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542 (1987)	*passim*
Monday v. Coast to Coast Wireless Cable, 1997 WL 114874 (M.D. Ala. 1997)	33
National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1869)	34

Page

Nachman Corp. v. Pension Benefit Guaranty Corp., 100 S. Ct. 1723 (1980) 18

Northbrook Nat'l Ins. Co. v. Brewer, 110 S. Ct. 297 (1989) 5

Partin v. Cableview, Inc., 948 F. Supp. 1046 (S.D. Ala. 1996) 34

Puerto Rico v. Russell & Co., 53 S. Ct. 447 (1933) 20

Reno v. American-Arab Anti-Discrimination Committee, 119 S. Ct. 936 (1999) 28

Rush Prudential HMO, Inc. v. Moran, 122 S. Ct. 2151 (2002) 36

Shamrock Oil & Gas Corp. v. Sheets, 61 S. Ct. 868 (1941) 6

Smiley v. CitiBank (S.D.), N.A., 116 S. Ct. 1730 (1996) 10, 23

Smith v. Beneficial National Bank USA, 971 F. Supp. 513 (M.D. Ala. 1997) 34

Smith v. GTE Corporation, 236 F.3d 1292 (11th Cir. 2001) 12

Page

Spellman v. Meridian Bank (Delaware), 1995 WL 764548 ..... 23, 25

Syngenta Crop Protection, Inc. v. Henson, 123 S. Ct. 366 (2002) 5, 6

The Fair v. Kohler Die & Specialty Co., ~~33 S. Ct.~~ 410 (1913) 9

United States Stover Broadcasting Co., 76 S. Ct. 763 (1956) 28

University of South Alabama v. American Tobacco Co., 108 F.3d 405 (11th Cir. 1999) 6

Unum Life Ins. Co. of America v. Ward, 119 S. Ct. 1380 (1999) 11

Video Trax, Inc. v. NationsBank, N.A., 33 F. Supp. 2d 1041 (S.D. Fla. 1998) 26

West Virginia v. Parrish Automobile Training Co., 147 F. Supp. 2d 470 (N.D. W. VA. 2001) 33, 34

Cited Authorities

	Page
Statutes and Rules:	
Code of Alabama (1975), § 8-8-1	1, 9
12 U.S.C. § 24	15
12 U.S.C. § 85	11, 17, 27, 33
12 U.S.C. § 86	11, 17, 33
12 U.S.C. §§ 85-86	15
15 U.S.C. § 1601(a)	35
15 U.S.C. § 1640	35
28 U.S.C. § 1144	18
28 U.S.C. § 1331	15
28 U.S.C. § 1367(c)(3)	28
28 U.S.C. § 1441	6
28 U.S.C. § 1441(a)	5
29 U.S.C. § 1132	17
Other Authority:	
Michael T. Collins, the Unhappy History of Federal Question and Removal, 71 Iowa Law Review 717 (1986)	26

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth by Petitioners, Ala. Code § 8-8-1 (1975) is also involved.

STATEMENT OF THE CASE

On or about September 19, 2000, Plaintiff Marie Anderson, and twenty-five (25) other persons, filed a Complaint in the Circuit Court of Barbour County, Alabama, Clayton Division, against defendants H & R Block, Inc. ("H & R Block"), Beneficial National Bank, and Beneficial Tax Masters, Inc. (collectively referred to herein as "Beneficial"). The factual allegations of the Complaint are that Plaintiffs went to H & R Block and were participants in the H & R Block tax refund anticipation loan program. A tax refund anticipation loan is where a taxpayer is given a short term loan from Beneficial in exchange for a pledge of an anticipated tax refund. The allegations of the Complaint are that the interest rate and fees paid by Plaintiffs for the tax refund anticipation loans was higher than the rate disclosed to the plaintiffs, that Defendants utilized unreasonable repayment periods to calculate the interest rate, and that the amount charged for interest was in excess of that allowed by the State of Alabama. The causes of action in the Complaint are for fraud (Count I); suppression (Count II); breach of fiduciary duty (Count III); for the charging of an excessive interest rate under Ala. Code § 8-8-1 (1975) (Count IV); and for violation of the Alabama Mini-Code (Count V).

Defendants removed the case to the District Court for the Middle District of Alabama, asserting complete preemption of Plaintiffs' usury claims (Count IV) under the National Bank Act. On November 22, 2000, Plaintiffs timely filed a Motion to Remand. On December 14, 2000, the District Court entered an

Order denying Plaintiffs' Motion to Remand the case to state court. However, the District Court certified its Order denying Plaintiffs' remand motion for interlocutory appeal to the Eleventh Circuit Court of Appeals. On April 3, 2002, the Eleventh Circuit reversed the District Court's Order denying Plaintiffs' Motion to Remand, and remanded the case for further proceedings consistent with its opinion.

The Eleventh Circuit's opinion, *Anderson v. H&R Block, Inc., et al.*, 287 F.3d 1038 (11th Cir. 2002), recognized that the well-pleaded complaint rule applies where a federal defense is pled in answer to a complaint setting forth exclusively state – law causes of action. The Court held that unless a federal cause of action appears on the face of the complaint, no federal removal jurisdiction exists. *Anderson*, 217 F.3d at 1042. Recognizing that no federal cause of action exists on the face of the Complaint, the Eleventh Circuit went on to analyze whether the exception to the well-pleaded complaint rule for causes of action "completely preempted" applies to the National Bank Act (sometimes referred to herein as the "NBA"). In completing this analysis, the Eleventh Circuit first recognized that complete preemption is "rare", and then held that it did not find in the National Bank Act the requisite indicia of intent that there be such "extraordinary" preemption. *Anderson*, 287 F.3d at 1043, 1047.

Both Beneficial and H & R Block filed Petitions for a Writ of Certiorari with this Court. The Petition for Writ of Certiorari was granted, as to Beneficial National Bank and Beneficial Tax Masters, Inc., on January 24, 2003.

SUMMARY OF ARGUMENT

The limited jurisdiction of the federal courts is only invoked where the face of the complaint states a federal cause of action. This "powerful doctrine" is known as the well-pleaded complaint rule, and is now well-established. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2846 (1983); *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987). No federal cause of action appears on the face of the Complaint in this case, and neither the National Bank Act nor the factual scenario contained in the pleadings in this case, call for abrogation of the well-pleaded complaint rule.

The effect of the well-pleaded complaint rule is that "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question at issue." *Caterpillar*, 107 S. Ct. at 2430. Despite the clear direction of this Court, that is exactly what Defendants attempt to do in this case – remove a case containing only state law causes of action based upon a federal defense that they have injected into the case.

The well-pleaded complaint rule does not affect a defendant's ability to present a federal defense as a matter of ordinary preemption. What the well-pleaded complaint rule does do is prevent a defendant from creating federal jurisdiction at its whim, as opposed to following the concrete rule that the federal claim must be on the face of the complaint, and that a plaintiff is the master of his or her complaint. *Caterpillar Id.* Faced with this authority, Defendants seek to fit the National Bank Act within a very

narrow exception to the well-pleaded complaint rule – an exception referred to as "complete" or "field" preemption. Complete preemption has been recognized in only two instances: Claims brought to construe the terms of a collective bargaining agreement (LMRA); and claims relating to an employer provided benefits plan (ERISA). However, both of these comprehensive, reticulated, federal statutory schemes contain indicia of specific congressional intent that they create removal jurisdiction. Not only is there no such congressional intent under the National Bank Act, but this Court has already held that setting forth a defense of preemption under the National Bank Act to state law claims does not create removal jurisdiction. *Gully v. First National Bank of Meridian*, 57 S. Ct. 96 (1936).

The reason that the National Bank Act does not create removal jurisdiction is that, unlike ERISA or LMRA, where, "state law does not exist as an independent source of private rights to enforce collective bargaining contracts [or ERISA plan benefits]." *Caterpillar*, 107 S. Ct. at 2431, quoting *Avco*, state law does create an independent source of private right to be free from usurious interest rates. There is an independent source of a private right to be free from excessive interest created by Alabama law that has been pled in this case. That is the Alabama usury statute. If there were no federal law to interpose as a defense, it could not be said in any way, shape, or form, that a claim under the Alabama usury statute arises under the constitution or laws of the United States. Indeed, were this a claim against a national bank chartered in Alabama by an Alabamian, there would be no question that the source of the private right to be vindicated in a claim under the National Bank Act would be Alabama law. This is in direct contradiction to the source of private rights to be vindicated in claims brought for benefits under an

ERISA plan, or to enforce the terms of a collective bargaining agreement, which are creatures of federal law.

Lastly, Defendants have specifically stated that they wish to narrowly confine their new species of removal jurisdiction under the NBA to usury claims only. If Defendants' proposed scheme were to play out, this would result in the dismissal of the usury claim, and, absent an amendment bringing a claim under the National Bank Act, a case in federal court with no independent jurisdictional basis. Again, this would be an extension of existing law not contemplated by the statutory scheme in place since 1887. *Franchise Tax Bd.*, 103 S. Ct. at 2846. Defendants' insertion of the National Bank Act in this case is nothing more than a defense to state law claims, and under this Court's long held and well-reasoned precedent, the bounds of jurisdiction do not allow for such.

ARGUMENT

A. The Burden Is On Defendants To Show That State Law Causes Of Action Are Removable.

Removal jurisdiction, of course, is "limited to such actions which could have been brought originally in federal courts." *Northbrook Nat'l Ins. Co. v. Brewer*, 110 S. Ct. 297, 300 (1989); 28 U.S.C. § 1441(a). The limited right of removal, which did not exist at common law, and is not mentioned in the Constitution, "is entirely a creature of statute and 'a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress.'" *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 369 (2002), quoting *Great Northern & Co. v. Alexander*, 38 S. Ct. 237 (1918). Moreover, it is clearly

established that the party asserting removal jurisdiction has the burden to show that some act of Congress strictly applies. *University of South Alabama v. American Tobacco Co.*, 108 F.3d 405, 411-12 (11th Cir. 1999); *Sygenta, supra* ("These statutory procedures for removal are to be strictly construed."); *Shamrock Oil & Gas Corp. v. Sheets*, 61 S. Ct. 868, 872 (1941) (policy underlying removal statutes "is one calling for the strict construction of such legislation.") *Healy v. Ratta*, 54 S. Ct. 700, 703 (1934) ("Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defied.")

1. The Jurisdictional Question Must Be Analyzed Pursuant To The Well-Pleaded Complaint Rule.

In this case, diversity is not an issue. The question is whether Plaintiffs' claims "arise under" the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1441. That question must be answered by reference to the well-pleaded complaint rule. The well-pleaded complaint rule has been succinctly set forth by this Court.

> One powerful doctrine has emerged, however – the "well-pleaded complaint" rule – which as a practical matter severely limits the number of cases in which state law "creates the cause of action" that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts.
>
> "[W]hether a case is one arising under the Constitution or a law or treaty of the United States,

> in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S. Ct. 724, 724, 58 L. Ed. 1218 (1914).

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust, 103 S. Ct. 2841, 2846 (1983). "For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law." *Id.* (emphasis in original).

2. No Federal Cause Of Action Appears On The Face Of Plaintiffs' Complaint.

It is clear that no federal claim is pleaded on the face of the Complaint in this case. The Complaint sets forth the underlying factual allegations outlining the refund anticipation loan process, and then states that the interest charges "were knowingly assessed by the Defendants and are in excess of the legal limit on interest rates allowed under Alabama statute and the common law doctrine of usury . . ." (Complaint, ¶ 36). The Complaint then recounts the misrepresentations and suppressions of Defendants.

> 39. Defendants misrepresented material facts to the Plaintiffs which facts include, but are not limited to, the following:
> (a) the interest rate paid by the Plaintiffs exceeded the rate disclosed to the plaintiffs.

(b) the Plaintiffs fee and interest rate would be substantially higher than the rate disclosed due to the Defendants' receipt of loan repayments.
(c) the Defendants utilized unreasonable repayment periods to calculate the interest rate.

* * *

45. The material facts which the Defendants withheld, concealed, and suppressed from Plaintiff include, but are not limited to, the following:
(a) the interest rate paid by the Plaintiffs exceeded the rate disclosed to the plaintiffs.
(b) the Plaintiffs fees and interest rate would be substantially higher than the rate disclosed due to the Defendants' receipt of loan repayments.
(c) the Defendants utilized unreasonable repayment periods to calculate the interest rate.

(Complaint, ¶¶ 39, 45). Finally, in terms of factual pleading, the Complaint sets forth the facts outlining Defendants' breaches of fiduciary duty to Plaintiffs (Complaint, ¶¶ 51-57).

The facts in the Complaint support the following causes of action *all pled under Alabama law*: Intentional Misrepresentation (fraud) (Count I); Suppression (Count II); Breach of Fiduciary Duty (Count III); Usury (Count IV); and Violation of the Alabama Mini-Code (Count V). The only

cause of action Defendant argues provides any basis for removal jurisdiction is Count IV, which is clearly pled as a violation of the Alabama common law usury doctrine, and Ala. Code § 8-8-1. Under the well-pleaded complaint rule, there is no jurisdiction.

B. A Defense To A State-Law Claim Cannot Provide A Basis For Federal Jurisdiction.

The well-pleaded complaint rule

> makes the plaintiff master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law . . . [and] it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, Inc. v. Williams, 107 S. Ct. 2425, 2429, 2430 (1987), citing, *Franchise Tax Bd.*, 103 S. Ct. at 2847, 48. *The Fair v. Kohler Die & Specialty Co.*, 33 S. Ct. 410, 411 (1913) ("Of course, the party who brings suit is master to decide what law he will rely upon.")[1]; *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229, 3233 (1986) ("Jurisdiction may not be sustained on a theory that

1. Defendants and Defendants' *amici* make the argument that a party may not avoid federal jurisdiction by "artful pleading." (Petitioner's Brief, p. 15). The law is clear that a plaintiff may eschew federal claims in order to keep a case in state court if that is plaintiff's wish.

the plaintiff has not advanced."). Because the plaintiff is the master of his complaint, and under the statutory framework giving rise to the well-pleaded complaint rule, it is firmly established that a defense based in federal law cannot provide federal jurisdiction.

Despite the clear precedent that a federal defense to a state law claim will not confer federal removal jurisdiction, this is precisely what Defendants seek to do. The cases cited by Defendant for the proposition that federal law governs claims against National Banks, from *Farmers & Mechanics' National Bank v. Dearing*, 91 U.S. (1 Otto) 29 (1875); to *Smiley v. CitiBank (S.D.), N.A.*, 517 U.S. 735 (1996) stand for nothing more than the proposition that usury claims under state statutes are subject to ordinary preemption. Preemption of a state law claim does not give rise to removal jurisdiction.

1. Difference Between Ordinary And Complete Preemption.

Ordinary preemption is a defense that may be raised in a state court, as well as in federal court. As a defense, ordinary preemption does not appear in the plaintiff's well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. *Caterpillar, Inc.*, 482 U.S. at 393. Unlike the defense of ordinary preemption, the doctrine of complete preemption gives a defendant the ability to remove the case to federal court. *BLAB TV of Mobile, Inc. v. Comcast Cable Comm., Inc.*, 182 F.3d 851, 854 (11th Cir. 1999).

The Supreme Court has found complete preemption under only two federal statutory schemes: Claims founded

"directly on rights created by collective bargains agreements . . . [or] substantially dependent on analysis of a collective bargaining agreement." *Caterpillar*, 107 S. Ct. at 2431, quoting *Electrical Workers v. Hechler*, 107 S. Ct. 2161, 2166-67 n.3 (1987); and claims for benefits provided under an ERISA plan. *Unum Life Ins. Co. of America v. Ward*, 119 S. Ct. 1380 (1999).

In *Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542 (1987), the Supreme Court cautiously extended the doctrine of complete preemption to ERISA § 502(a) claims. However, the doctrine of complete preemption applies only where Congress has "clearly manifested an intent" to make a particular cause of action removable to a federal court. *Metropolitan Life Ins. Co.*, 107 S. Ct. at 1548. The *Metropolitan Life* Court explained the difference between ordinary and complete preemption as such:

> Federal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. *Gully v. First National Bank*, 299 U.S. 109 (1936). One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a particular area that any civil complaint raising the select group of claims is necessarily federal in character. For twenty years, this Court has singled out claims preempted by § 301 of the LMRA for such special treatment.[2]

2. Defendants' concern that somehow they are without the ability to use their ordinary preemption defense in the Alabama state courts is unfounded. Alabama courts have a long history of applying the doctrine of ordinary preemption to §§ 85 and 86 of the National (Cont'd)

Metropolitan Life, 107 S. Ct. at 1546. In *Metropolitan Life*, the Court citing clear legislative history noted that, "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) [of ERISA] removable to federal court." *Id.* at 1548. However, there is no similar "clearly manifested of intent" to make causes of action within the scope of the National Bank Act removable to federal court. Indeed, even the opinion in *M. Nahas & Co., Inc.*, 930 F. 2d 608, 611 (8th Cir. 1991), the Circuit Court opinion Defendants pointed to in arguing that there was a split in the Circuits, recognizes that National Banks have been denied removal, "even though the National Bank Act would ultimately control all or part of plaintiff's state law action."

2. The National Bank Act Does Not Meet The Test For "Field", "Complete" Or "Super" Preemption".

Both this Court, and the Eighth Circuit, see *supra*, have held that the National Bank Act does not occupy the field of banking regulation to the extent that it completely preempts state law claims against National Banks dealing with subject matter covered by regulation. In *Gully v. First National Bank of Meridian*, 57 S. Ct. 96 (1936), the Court considered whether a claim by the tax collector for the State of Mississippi against a national bank was preempted because, "the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of the federal statute

(Cont'd)

Bank Act where warranted. *Helms v. First Alabama Bank, N.A.*, 386 So. 2d 450 (Ala. 1980); *Florence R. R. & Improvement Co. v. Chase National Bank*, 17 So. 720 (Ala. 1895). Simply put, the denial of federal jurisdiction does not preclude the defense of preemption. *Smith v. GTE Corporation*, 236 F.3d 1292 (11th Cir. 2001).

. . . and that by necessary implication a plaintiff counts upon the statute in suing for the tax." *Gully*, 57 S. Ct. at 97. This Court disagreed, stating:

> Petitioner will have to prove that the state law has been obeyed before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal rule. The most one can say that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, to far removed form plain necessity, is unavailing to extinguish the jurisdiction of the states.

Gully, 57 S. Ct. at 99-100. Similarly, the Alabama usury claim, if it survives to be a claim at all, is brought under Alabama substantive law. The fact that there may be a federal defense to the claim does not grant the federal courts jurisdiction.[3]

3. Defendant casts doubt upon whether the Alabama Courts, including the Alabama Supreme Court, will follow ordinary preemption law (Petitioner's Brief, pp. 31, 36). The notion that jurisdiction can be based upon a fear that Alabama state courts will not follow the law of ordinary preemption was rejected by this Court in *Franchise Tax Bd., supra*, at 2848 n.12 ("If the state courts reject a claim of federal preemption, that decision may ultimately be reviewed on appeal by this court."). Moreover, that assertion does not square with the experience of the Alabama state courts, who have applied the preemptive force of the National Bank Act when applicable. *See Lowery v. First National Bank of Oneonta*, 196 So. 891 (Ala. 1940).

Following *Gully*, the Eighth Circuit in *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (1980), where a national bank argued that NBA preemption created removal jurisdiction, held that while the assertion of the NBA to a state law claim may provide a complete defense based on ordinary preemption, "we are not persuaded that the Supreme Court in *Avco* intended to invalidate the generally accepted principle that defensive assertion of federal preemption in response to a state law claim may not constitute a ground for removal." *First National Bank of Aberdeen*, 627 F.2d at 853.

The Supreme Court has already held that the National Bank Act does not provide removal jurisdiction merely because it provides a defense to a state law claim. *See Gully supra*. Given this ruling, and based upon the statutory framework as it has existed since 1887, *Franchise Tax Bd.*, 103 S. Ct. at 2847 ("since 1887 it has been settled that a case may not be removed to federal court on the basis of a federal defense, even the defaults of preemption"), Defendant is left to argue that claims brought against national banks are subject to the extremely limited doctrine of "field" or "complete" preemption.

In order for there to be complete preemption, the preemptive force of a federal statute must be "so powerful" as to "displace entirely any state cause of action." In the LMRA context, the Courts have held that Congress intended to preempt any cause arising out of an employer/employee relationship covered by a collective bargaining agreement. This complete preemption power in the LMRA context has been stated in the following terms. "The necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action

'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd*, quoted in *Metropolitan Life*, *supra*. It is clear that the National Bank Act does not displace entirely any cause of action between a person and a national bank where the National Bank Act is implicated. *See M. Nahas*, *First National Bank of Aberdeen*, *Gully*, *supra*. The doctrine of complete preemption simply does not apply.

The text of the NBA shows that it was intended that national banking associations could be sued in the state courts. When Congress replaced the 1863 Act in 1864, the statutory language provided, "Suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court . . . or in any state county, or municipal court in the county or city in which said association is located . . ." *Mercantile Nat'l Bank at Dallas v. Longdeau*, 371 U.S. 555 (1963), citing 13 Stat. 116-17. Even today, the Act at 12 U.S.C. § 24 states that a National Association shall have the power, "To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." 12 U.S.C. § 24. Clearly, it was not the intent of Congress when the National Bank Act was enacted, nor is it the intent today, that national banking associations only be subject to suit in the federal courts.

The subsections of the National Bank Act that are at issue in the present case were initially enacted as § 30 of the National Bank Act of 1864, which is now codified at 12 U.S.C. §§ 85-86[4], and read as follows:

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4. Sections 85 and 86 were enacted into law by Congress *before* the existence of federal jurisdiction as enacted under 28 U.S.C. § 1331. The first version of § 1331 was enacted on March 3, 1875, ch. 137, § 1, 18 Stat. 470. *Franchise Tax Bd.*, 103 S. Ct. at 2845.

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, **interest at the rate allowed by the laws of the State**, Territory or District where the bank is located, or at a rate of one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where the laws of any State a different rate is limited for banks organized under state laws, if the rate so limited shall be allowed for associations organized or existing in any such state under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve or charge a rate not exceeding 7 per centum, or one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States or a District of Columbia shall be at the rate allowed by the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. At the purchase, discount, or sale of a bonafide bill of exchange, payable to another place than the place of such purchase, discount, or sale, at not more

than the current rate of exchange per site drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 85 (emphasis added).

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by § 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided, that such action is commence within two years from the time the usurus transaction occurred.

12 U.S.C. § 86.

The National Bank Act, 12 U.S.C. § 85, vests the *states* with the authority to legislate and establish interest rate limitations. As such, it is highly unlikely that Congress intended to confer complete federal preemption through the adoption of the laws of the several states. *See Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 (11th Cir. 1999) (super preemption applies when Congress comprehensively occupies a field of law and is necessarily federal in character). With the enactment of ERISA, Congress created "a comprehensive remedial scheme in 29 U.S.C. § 1132 for loss or denial of employee benefits." *Butero*, 174

F.3d 1207, 1211 (11th Cir. 1999), citing, *Metropolitan Life*, *supra*, at 1546. With regard to ERISA, its "legislative history indicates, that, in light of the act's virtually unique preemption provision, *see* § 514, 28 U.S.C. § 1144, 'a body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Franchise Tax Bd.*, 103 S. Ct. at 2854 n.26 quoting 120 Cong. Rec. 29,942 (1974) (Sen. Javits). There is no federally created substantive right created by the NBA. The NBA merely states which states' laws with regard to usury will apply. Far from envisioning a comprehensive federal scheme like ERISA or the LMRA, the NBA merely creates priority for one state's laws over another. As such, Defendants' arguments for "uniformity" ring hollow, and are clearly distinguishable from ERISA and LMRA enforcement actions.

Both the ERISA, and the LMRA, present a unique, *federally created* "interlocking inter-related, and interdependent remedial scheme," *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085, 3092 (1985), which is part of a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 100 S. Ct. 1723, 1726 (1980). The NBA creates no such comprehensive federal body of law, it merely prioritizes substantive rights created by the statutes of the several states.[5]

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5. Defendants' arguments that complete preemption exists due to the provision of a federal remedy falls short of the mark also. This Court in *Caterpillar*, *supra*, specifically rejected the argument that the provision of a federal remedy plays any role in complete preemption analysis.

> The Court of Appeals also appears to have held that a case may not be removed to federal court on the ground
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In this case, Defendants argue that the laws of Delaware control the loan interest rate, rather than the laws of Alabama, where the loans were issued. On the other hand, it is clear that the National Bank Act would *not* preempt or otherwise apply to an interest rate claim by an Alabama consumer against an Alabama bank. The same is true with any Delaware

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> that it is completely pre-empted unless the federal cause of action relied upon provides the plaintiff with a remedy. For example, the court stated:
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> "[A] state law cause of action has been 'completely pre-empted' when federal law both displaces and supplements the sate law – that is, when federal law provides both a superceding remedy replacing the state cause of action and preempts that state law cause of action. These are two distinct inquiries, both of which must be satisfied to permit removal of an action to federal court." 786 F.2d at 932 (emphasis in original; citations omitted). This analysis is squarely contradicted by our decision in *Avco Corp. v. Machinist*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968). We there held that a § 301 claim was properly removed to federal court although, at the time, the relief sought by the plaintiff could be obtained only in state court. We reasoned as follows: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy. . . . [T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.*, at 561, 88 S. Ct. at 1237-1238. Thus, although we affirm the Court of Appeals judgment, we reject its reasoning insofar as it is inconsistent with *Avco*.
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> *Caterpillar*, 107 S. Ct. at 2429 n.4.

consumer against a Delaware bank. This in itself illustrates that the National Bank Act does not displace the field of state interest rate regulation.

Defendants argue that the National Bank Act completely preempts because any claim for excessive usury must be made pursuant to the federal Act. *Gully* instructs that the National Bank Act does not provide federal jurisdiction on those grounds. In *Gully*, the defendant made the same argument with regard to the exclusivity of the federal cause of action as is made in this case. The *Gully*, defendant argued, "that a federal controversy exists, the tax being laid upon a national bank or upon the shareholders therein, and for that reason being void unless permitted by the federal law." *Gully*, 57 S. Ct. at 98-99. The Court rejected the argument.

> "The federal nature of the right to be established is decisive – not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co. v. Mottley*, *supra*. With no greater reason can it be said to arise thereunder because permitted thereby.

Gully, 57 S. Ct. at 99, quoting, *Puerto Rico v. Russell & Co.*, 53 S. Ct. 447, 449 (1933). Similarly, the fact that a claim for usury is only permitted by reference to the federal law does not make a claim under a state statute for usury federal in nature, it only provides a defense thereto.

In a thorough analysis of precedent on the issue, the United States District Court for the Southern District of Alabama ruled that the National Bank Act *does not* confer complete preemption over state law claims for excessive interest. In *Jones v. BankBoston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. 2000), the Court engaged in a significant analysis of the Congressional intent and history of the National Bank Act.

> [T]he significance to complete preemption analysis of jurisdictional language paralleling that of the LMRA is dependent on whether the jurisdictional language was enacted after the 1968 *Avco* decision; only then may it be inferred that Congress, by its use of such language, desired to mimic the complete preemption embedded in the LMRA. Because the National Bank Act's jurisdictional provision was enacted a century before *Avco*, it cannot be construed as an effort to invoke complete preemption by parallelism . . . Even if closely parallel jurisdictional language carried any significance with respect to statutes enacted before 1968, the National Bank Act's jurisdictional provision does not closely parallel that of the LMRA.

The most striking difference between the National Bank Act and the LMRA, however, lies in their treatment of state court jurisdiction; while the LMRA is silent, the National Bank Act expressly contemplates state court jurisdiction. Thus the National Bank Act's jurisdictional provision varies materially in every respect from the jurisdictional language common to the LMRA and

> ERISA. Such a jurisdictional provision cannot be said to "closely parallel" the LMRA for purposes of complete preemption analysis.

Jones, 115 F. Supp. 2d at 1358. The *Jones* Court went on to analyze the faulty reasoning of the *M. Nahas* decision.

> The Eighth Circuit's reliance on the existence of an "exclusive federal remedy" without any further showing of congressional intent is not only inconsistent with *BLAB TV*, by which this Court is bound, but also appears to contradict *Metropolitan Life v. Taylor* itself . . . were the existence of an "exclusive federal remedy" the only requirement for complete preemption, the *Metropolitan Life* Court would have concluded its analysis at this point and declared the Plaintiffs' claims completely preempted. Rather than doing so, the Court noted it would be "reluctant" to grant complete preemption on so slender a basis and instead launched into its explication of the statute and its legislative history. . . . This Court is aware of no other appellate court utilizing the Eighth Circuit's lenient test for complete preemption and is neither empowered nor inclined to adopt it.

Jones, 115 F. Supp. 2d at 1356 (citations omitted in original).

In *Metropolitan Life Ins. Co.*, the Supreme Court held that express statutory language and Congressional intent to displace entirely any state cause of action was *required* for the application of the doctrine of complete preemption. The Court examined the language of the jurisdictional subsection of ERISA's civil enforcement provisions and

determined that Congress had clearly manifested an intent to make state causes of action removable to federal court. *Metropolitan Life*, 107 S. Ct. at 1547. The Supreme Court clarified its holding on complete preemption by stating that:

> [E]ven with a provision such as [ERISA] § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA, however, we would be reluctant to find that extraordinary preemptive power, such as has been found with respect to § 301 of the L.M.R.A., that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded Complaint rule.

Metropolitan Life, 481 U.S. at 65, 107 S. Ct. at 1547 (internal citations omitted).

The Third Circuit, in the case of *Spellman v. Meridian Bank (Delaware)*, 1995 WL 764548,[6] explained the Supreme Court precedent as to complete preemption in words far more elegant than this writer could summon.

> The Supreme Court has held affirmative evidence of Congressional intent could be the touchstone

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6. The *Spellman* opinion is available as a 1995 Westlaw cite, and was not published in the Federal Reporter. Following the panel opinion, the Third Circuit voted to grant rehearing *en banc* and vacated the panel opinion. The appeal was dismissed before any *en banc* opinion was issued. The appeal was dismissed in July of 1996 pursuant to the Supreme Court's ruling in *Smiley v. CitiBank*, 517 U.S. 735 (1996) which involved a technical definition of "interest" and did not involve the issue of complete preemption. It is cited merely because the language is clear, and sets forth succinctly the distinction between ERISA and the LMRA on one hand, and the National Bank Act on the other.

of the federal district court's removal jurisdiction and, as discussed above, the court has found such intent only rarely. The complete preemption doctrine was originally rooted in a cause of action arising under § 301 of the L.M.R.A. The court extended the doctrine reluctantly, in *Metropolitan Life*, to an action arising under ERISA. The court wrote that it did so only because "ERISA's civil enforcement provisions closely parallels [sic] that of § 301 of the L.M.R.A.," and because explicit language in the ERISA Conference Report analogized the ERISA provision to the L.M.R.A. language. In the absence of explicit direction from Congress, the court wrote:

> [e]ven with a provision such as 502(a)(1)(B) [the jurisdictional provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . we would be reluctant to find that extraordinary pre-emptive power, such as that has been found with respect to 301 of the L.M.R.A., that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Neither the National Bank Act nor DIDA contains a jurisdictional provision evidencing Congressional intent to permit removal of the sort relied upon in *Avco* and *Metropolitan Life*. Nor have the banks pointed to Congressional language suggesting that parties may bring suit against banks in federal court without regard to the citizenship of the parties or the amount in controversy.

> Congressional intent to permit removal based on complete preemption would be difficult to divine from the legislative history of the National Bank Act, because the act was passed in 1864, pre-dating federal question jurisdiction, the well pleaded complaint rule, and the doctrine of complete preemption. The banks argue, nonetheless, that Congress evidenced an intent to provide an exclusive source of relief for claims of overcharge that, coupled with the general federal provision allowing for removal of federal question cases, demonstrates Congressional intent to allow removal. However, the defendants point to nothing in the legislative history of §§ 85 and 86 that present the sort of clear indication of Congressional intent we have looked for in the past.

Spellman, 1995 WL 764548, *6-7 (internal quotations omitted).

The requirements specifically articulated by the Supreme Court are not met in this case – there is neither statutory language nor Congressional intent for the proposition that the National Bank Act displaces entirely Plaintiffs' state law causes of action.[7] Further examination of the absence of

7. Defendants' assertion that congressional intent cannot possibly be gleaned as to removal under the National Bank Act because it was enacted before general federal question jurisdiction, and before removal was allowed, is not true. First, when Congress enacted the National Bank Act in 1864, it provided that suit could be brought in federal or state court. *See supra*. Moreover, had the Congress wished to provide for removal of suits under the National Bank Act, it could have done so. At the time, Congress had provided

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complete preemption in the National Bank Act by the District Court for the Southern District of Florida has held that banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the states, and thus state legislatures may legislate in all areas not expressly or impliedly preempted by federal legislation. *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998).

> The determination of the maximum amount of interest which may be charged for the use of money loaned has always been within the police power of the state, and the details of the exceptions to the legislation have rested within the discretion of the state legislature. In § 85 of the Bank Act, Congress expressly and unambiguously stated that a national bank was subject to the interest provision of the laws of the state in which the bank was located.

Video Trax., 33 F. Supp. 2d at 1050 (internal citations omitted).

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in a handful of civil acts that federal law would both provide a defense, and for removal of a cause of action from state to federal court. *See, e.g.*, Act of March 3, 1863, 12 Stat. 755 (amended by the Act of May 11, 1866, 14 Stat. 46), Congress provided for a federal defense and provided the right of removal of civil or criminal actions arising out of acts committed under federal authority during the Civil War. *See Mayor & Alderman of City of Nashville v. Cooper*, 73 U.S. 247 (1867); *Michael T. Collins, the Unhappy History of Federal Question and Removal*, 71 Iowa Law Review 717, 720-21 (1986). Simply put, had Congress, at the time, it intended that suits arising out of the National Bank Act be litigated only in the federal courts, Congress had the ability to provide for such extraordinary jurisdiction. It chose not to do so with regard to the National Bank Act.

There is no question that interest rates are determined by state law. There is no legislative language evidencing Congressional intent that state-law actions relating to interest rate claims against national banks are to be considered as arising under federal law for purposes of removal jurisdiction. There is no indication that the National Bank Act's jurisdictional language is intended to function in the same manner of Section 301 of the LMRA, or § 502(a) of ERISA, pursuant to the guidance of the Supreme Court in *Metropolitan Life*. *See BLAB TV*, 132 F.3d at 857. Defendants cannot extrapolate the doctrine of complete preemption and claim that the laws of the State of Delaware, through the application of 12 U.S.C. § 85 and "super preemption", create federal subject matter jurisdiction.

At best, the provisions of the National Bank Act only create a defense based upon the factual application of interest regulations between the several states and relies on interpretation of the *laws of a particular state*. Removal is simply improper where a case cannot be "removed on the basis of a federal defense, including the defense of preemption." *Caterpillar*, 107 S. Ct. at 2429.

D. The Effect Of ERISA And The LMRA Highlight The Lack Of Complete Preemptive Power In The National Bank Act.

Not only is there a lack of any manifest intent showing that field preemption is proper, but the practical effect of what Defendants request shows that the National Bank Act cannot support removal jurisdiction based upon complete or field preemption. The Complaint in this case asserts causes of action under Alabama state law for fraud, suppression, breach of fiduciary duty, and violation of the Alabama Mini-

Code, in addition to the state law usury claim. Not even Defendants argue that these causes of action somehow confer removal jurisdiction. However, Defendants' plan would eventually leave these claims in federal court with no jurisdictional basis.

Assuming *arguendo* that the National Bank Act preempts the state law usury claims under the principles of ordinary preemption shows the folly of Defendants position. If a district court were to take jurisdiction over such a case, and then dismiss the usury claim, unless there were amendment to include a federal usury claim, only two scenarios are possible: either (1) the district court would remand the case for lack of jurisdiction[8], or (2) the case would remain in federal court with no independent jurisdictional basis. The latter alternative is possible, but not likely, *See* note 8, *supra*, where a district court has a duty to examine its jurisdiction, and remand a case, *sua sponte* if necessary, lacking federal jurisdiction. *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936, 945 n.10 (1999); *United States v. Stover Broadcasting Co.*, 76 S. Ct. 763, 772 (1956).

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8. Plaintiff recognizes that a district court has the authority to retain such cases under its supplemental jurisdiction, 28 U.S.C. § 1367(c)(3). However, given that the only "federal" claim would normally, as in this case, be the subject of a motion on the pleadings early in the case, it seems that such cases should be remanded *Carnegie-Mellon Univ. v. Cohill*, 108 S. Ct. 614, (1988) ("In the usual case in which all federal law claims are eliminated before trial, the balance of the factors to be considered under the pendant jurisdiction doctrine, judicial economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state law claims.")

The certainty of a case in federal court with no independent, jurisdictional basis if Defendants' scenario plays out, stands in stark contrast to the scenario when the unique field preemptive power contained in ERISA and the LMRA are applied. In *Avco v. Aero Lodge No. 735*, 88 S. Ct. 1235 (1968), the doctrine of complete or field preemption was established in a case brought to construe language in a collective bargaining agreement subject to the LMRA.[9]

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9. In a show of just how "extraordinary" a doctrine complete preemption is, the *Caterpillar* Court, in a case argued the same day, and decided only two months after complete preemption was extended to ERISA claims, *see Metropolitan Life Ins. Co. v. Taylor*, further circumscribed the doctrine of complete preemption. In *Caterpillar*, employees made state law claims for breach of contract relating to statements made to them while they were managerial employees, where the employees later were downgraded to positions covered by a collective bargaining agreement. The Court held that the claims were brought pursuant to state law, and remanded the case, despite the fact that the action could have been brought pursuant to the collective bargaining agreement under § 301 of the LMRA. *Caterpillar*, 107 S. Ct. at 2431. ("It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under § 301. As masters of the complaint, however, they chose not to do so.") Similarly, while Plaintiffs in this case could have brought federal usury claims, they chose not to do so. They brought a claim which may well be subject to a federal defense, but this does not create jurisdiction under the removal statute. As the *Caterpillar* Court stated,

> But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state law claim, transform the action with one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing.

Caterpillar, 107 S. Ct. at 2433.

The Court held that, because the action was brought to construe a "no strike" clause within the collective bargaining agreement covered exclusively by the LMRA, it was an action brought pursuant to the LMRA, and therefore, the claim itself, arose under a federal statute. As explained by the *Franchise Tax Bd., Court*:

> The necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as displace entirely any state cause of action 'for violation of contracts between and employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of 1301,

Franchise Tax Bd., 103 S. Ct. at 2853.

The underpinning for the lone extension of the complete preemption doctrine, to ERISA actions, which the Court "reluctantly" made, *Metropolitan Life*, 107 S. Ct. at 1547, is the expressed legislative intent that actions to enforce ERISA rights "arise under" the laws of the United States. The *Metropolitan Life* Court cited the following ERISA legislative history:

> [W]ith respect to suits to enforce benefit rights under the plan of to recover benefits under he plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those

> courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 if the Labor-Management Relations Act of 1947.

4. R. Conf. Rep. No. 93-1280, p. 327 (1974), quoted in *Metropolitan Life*, 107 S. Ct. at 1547. There is no such unequivocal legislative history regarding the NBA. This is particularly compelling where the Court stated the crucial nature of clear legislative history.

The clear distinction between ERISA/LMRA preemption and NBA ordinary preemption is that, "state law does not exist as an independent source of private rights to enforce collective bargaining contracts [or ERISA plan benefits]". *Caterpillar*, 107 S. Ct. at 2431, quoting *Avco Corp. v. Machinists*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd Avco*, *supra*. In other words, there is no independent cause of action to enforce the terms of a collective bargaining agreement or an ERISA plan. Such rights do not exist but for the federal statutory schemes creating uniquely federal private rights of action. However, there is an independent cause of action for usurious interest based upon Alabama law, not referable in the least to any federal statute. This was the holding in *Gully*, *supra*.

> If there were no federal law permitting the taxation of share in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. *Tennessee v. Union &*

> *Planters' Bank, supra*; *Sawyer v. Kochersperger*, 170 U.S. 303, 18 S. Ct. 946, 42 L. Ed. 1046; *Arkansas v. Kansas & Texas Coal Co.*, 183 US. 185, 22 S. Ct. 47, 46 L. Ed. 144; *Louisville & Nashville R. Co. v. Mottley, supra*. That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

Gully, 57 S. Ct. at 99. If there were no federal law preempting state usury claims, a suit for usury under the Alabama statutes would not arise under the Constitution of the United States. If there were no ERISA or LMRA, however, there would be no ERISA or LMRA enforcement actions. The fact that there may be a federal law preempting such a claim does not change the basis of the suit, which is still grounded in Alabama law.

E. Defendant's Position Would Create An Entirely New Type Of Federal Jurisdiction – "Claim Removal".

Not even Defendants take the position that all claims implicating the National Bank Act are preempted. ("But Petitioners do not claim that all cases against national banks, or all cases in which the National Bank Act may be implicated, are removable.")[10] (Petitioner's Reply Brief to

10. Defendants further maintain that their preemptive focus is narrowly confined to usury claims. "[W]hat they [Petitioners] do maintain, and what is at issue here, is that suits for usury on the part of national banks are removable." (Petitioners' Opposition to Cert. Brief, p. 5). This statement, and Defendants' true intentions, are belied by their practice. Any question that what Defendants seek to

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Petition for Writ of Certiorari, p. 5). They cannot take this position because of the authorities holding that National Banks are subject to everyday, state, common law claims, where doing so does not interfere with the exercise of the bank's powers.[11] *See Barnett Bank v. Nelson*, 116 S. Ct. 1103,

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accomplish here is much broader than simply the complete preemption of usury claims is answered by the activities of these same two defendants in the case of *Hare, et al. v. H & R Block and Beneficial*, Case No. CV-02-C-C-1848-W, pending in the United States District Court for the Northern District of Alabama (copies of the Complaint and Order denying Motion to Lift Stay and Remand to State Court attached as Appendices AI and AII to Respondents Brief in Opposition to Petition for Writ of Certiorari). *Hare* is a tax refund anticipation loan case, with a factual scenario very similar to the case *sub judice*. However, the Complaint does not contain a cause of action for the charging of a usurious interest rate. Despite the absence of a claim that even has the National Bank Act as a defense, Defendants have successfully managed to remove the case, and keep it in Federal Court, on preemption grounds.

11. It is clear that Plaintiffs' fraud based claims are not within the scope of the NBA's usury provisions. That is because the right vindicated by those claims, the right to truthful statements regarding what a lender charges, is wholly separate and different from protection from high interest rates, disclosed or not. For this reason, "district courts have overwhelmingly found that claims for failure to disclose interest charges are not within the scope of § 85 of the NBA." *West Virginia v. Parrish Automobile Training Co.*, 147 F. Supp. 2d 470 (N.D. W. Va. 2001), citing *Monday v. Coast to Coast Wireless Cable*, 1997 WL 114874 (M.D. Ala. 1997) (Thompson, J.) (Holding that plaintiffs' state law claims for fraudulent failure to disclose certain charges for interest and discounts did not fall within the coverage of §§ 85 and 86 of the NBA, and remanding case to state court); *Hunter v. Beneficial National Bank USA*, 947 F. Supp. 446,

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1109 (1996); *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are

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451-52 (M.D. Ala. 1996); *Smith v. Beneficial National Bank USA*, 971 F. Supp. 513 (M.D. Ala. 1997) (DeMent, J.) (same); *Partin v. Cableview, Inc.*, 948 F. Supp. 1046, 1048-49 (S.D. Ala. 1996) (Vollmer, J.) (same).

In *Parrish Automobile*, the Court held:

> In order to come under § 85 and § 86 of the National Bank Act, the plaintiff must allege that the national bank too, received, reserved, or charged a rate of interest greater than that allowed by the laws of the state where the bank is located. *See* 12 U.S.C. §§ 85-86. In this case, the plaintiff does not allege that the interest was too high or that there was an interest rate overcharge. Instead, the plaintiff alleges that the defendants' failure to disclose to consumers the fact that Ideal Motors was adding interest points onto the rate quoted by the bank and then receiving the difference back from the bank was done in violation of the [West Virginia Consumer Credit and Protection Act].
>
> The Complaint does not refer to this as an excess charge in violation of the WVCCPA because it was a fee that was not disclosed as required by the act. However, this is not a claim that the rate charged, even after Ideal Motors added points onto the rate given by the lender, was excessive and in violation of state law regulating interest rates. This case is essentially a failure to disclose case.

Parrish Automobile, 147 F. Supp. 2d at 473.

designed to serve [the Federal] government)". This limited preemptive power (ordinary preemptive power in this case) is in stark contrast to the broad preemptive force of ERISA wherein any state law that "relates to" an ERISA plan is preempted. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1970). It is similarly inapposite to the preemptive power of the LMRA, which extends to sate law claims that call for any construction or interpretation of the terms of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985).[12]

If Petitioner's position is accepted, not only will the doctrine of complete preemption be expanded to an area that it heretofore had not been, but there would be a new species of federal removal jurisdiction based on the preemption of just one claim. In the ERISA context, *any* state law action that "relates to" ERISA benefits is replaced by a federal ERISA claim. In the LMRA context, suits for violation of contracts between an employer and a collective bargaining unit are replaced by a federal cause of action when those acts are applied, no state law claims remain. That is not the case with regard to Defendants' proposed NBA preemption

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12. The existence of the Truth-In-Lending Act ("TILA") further shows very clearly that there has never been any intent for the National Bank Act to preempt all claims dealing with the disclosure of interest, which is what this case is about. The Truth-In-Lending Act states as its purpose, "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). TILA contains a damages provision. 15 U.S.C. § 1640. If Congress recognized the NBA as the exclusive remedy for failing to disclose interest, there would have been no need for enactment of TILA. *See, Griffin v. Breckenridge*, 91 S. Ct. 1790, 1797 (1971) (As a rule of statutory constitution, it is not to be assumed that Congress meant to duplicate statutory coverage).

of usury claims. Petitioners wish to remove an entire case, leave state law claims arising out of the same conduct in the Complaint, and have the usury claim dismissed by operation of ordinary preemption. This would leave, as stated *supra*, state law claims in federal court with no jurisdictional basis to be there.

This is not the scenario extant with regard to LMRA and ERISA claims. Causes of action to enforce the terms of a collective bargaining agreement, or for ERISA benefits are purely creatures of federal law, *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2166 (2002), citing *Metropolitan Life*, *supra* (cause of action for benefits necessarily a creature of state law); *Franchise Tax Bd.*, 103 S. Ct. at 2841 (suit that could construe collective bargaining agreement "purely a creature of federal law."). State law provides no independent source of private right to vindicate. *Caterpillar*, *supra*, at 2431. There is literally no state law "vessel" to carry any action forward, and any claim to procure benefits provided for by those uniquely comprehensive federal statutory schemes arises under federal law. That is not so with regard to claims for excessive interest. There is a usury vessel provided by state law, as well as other state law remedies that even Defendants do not argue would also be preempted. It is the difference in the genesis of rights sought to be vindicated that shows what a true departure from the existing jurisdictional framework an adoption of Defendants' position would be. For the first time, a case would be subject to complete preemption because of the presence of one federal claim, but still retain state law claims to remedy the same wrong.

CONCLUSION

The *Franchise Tax Bd.*, Court explained that, "For better or for worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd.*, 103 S. Ct. at 2847. No federal cause of action appears on the face of the Complaint in this case. As such, the National Bank Act provides nothing more than a defense to this action. It is now settled that a mere defense cannot create removal jurisdiction. *Caterpillar*, 107 S. Ct. at 2430. Defendants' attempt to expand the doctrine of complete preemption sets forth a course that, "If we follow the ascent for enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or the Constitution itself with its circumvent restrictions upon legislative power." *Gully*, 57 S. Ct. at 100. The well pleaded complaint rule is the limitation on that ascent precluding removal based even on the defense of preemption. The well pleaded complaint rule should be followed in this case, and the Eleventh Circuit Court of Appeals' decision affirmed.

Respectfully submitted,

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